ILE COPY

Office-Supreme Court, U.S.
FILED
MAR 13 1961
JAMES R. BROWNING, Clerk

No. 805

In the Supreme Court of the United States

OCTOBER TERM, 1960

DONALD PETER VAN HOOK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

ARCHIBALD COX,
Solicitor General,

HERBERT J. MILLER, JR.,
Assistant Attorney General,

BEATRICE ROSENBERG,
RICHARD W. SCHMUDE,
Attorneys,

Department of Justice,
Washington 25, D. C.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statute and rule involved	2
Statement	3
Argument	6
Conclusion	13

CITATIONS

Cases:

Blalock v. *United States*, 247 F. 2d 615	8
Clark v. *United States*, 247 F. 2d 511	9
Evans v. *United States*, 252 F. 2d 509	7
Goetz v. *United States*, 216 F. 2d 270	7
Gonzales v. *United States*, 348 U.S. 407	11
Green v. *United States*, No. 70, decided February 27, 1961	12
Jones v. *United States*, 241 F. 2d 704	8
Meredith v. *United States*, 247 F. 2d 622	8
Reed v. *United States*, 205 F. 2d 216, certiorari denied, 346 U.S. 908	8
Simmons v. *United States*, 348 U.S. 397	11
Tyrrell v. *United States*, 200 F. 2d 8, certiorari denied, 345 U.S. 910	7
United States v. *Chodorski*, 240 F. 2d 590, certiorari denied, 353 U.S. 950	8
United States v. *Hartman*, 209 F. 2d 366	7
United States v. *Moore*, 217 F. 2d 428, reversed on other grounds, 348 U.S. 966	7, 8
White v. *United States*, 215 F. 2d 782, certiorari denied, 348 U.S. 970	8
Witmer v. *United States*, 348 U.S. 375	9

Statutes and Rules:

	Page
28 U.S.C. 1733	2, 7
50 U.S.C. (App.) 456(j)	4
50 U.S.C. (App.) 462	3
Rule 32(a), F.R. Crim. P.	2, 12, 13

Miscellaneous:

Department of the Army Regulations:	
601-270, par. 28	6, 7
Special Regulation 615-180-1, par. 27(b)	6

In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 705

DONALD PETER VAN HOOK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Vol. III, 1-9; Pet. App. 1-9) is reported at 284 F.2d 489.[1]

JURISDICTION

The judgment of the court of appeals was entered on November 22, 1960 (Pet. App. 10). A petition

[1] The record consists of three volumes and an appendix of the trial transcript, each of which is separately paginated. Volumes I and II contain selected government and defense exhibits at the trial, respectively. Volume III constitutes the proceedings in the court of appeals.

for rehearing was denied on January 10, 1961 (Pet. App. 11, 12). The petition for a writ of certiorari was filed on February 8, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether there was adequate proof that petitioner had refused to be inducted.

2. Whether there was basis in fact for petitioner's classification in selective service class 1-A-O (noncombatant service).

3. Whether the petitioner was afforded the proper procedures before the local and appellate selective service boards.

4. Whether the petitioner was properly sentenced.

STATUTE AND RULE INVOLVED

28 U.S.C. 1733 provides:

> (a) Books or records of account or minutes of proceedings of any department or agency of the United States shall be admissible to prove the act, transaction or occurrence as a memorandum of which the same were made or kept.
>
> (b) Properly authenticated copies or transcripts or any books, records, papers or documents of any department or agency of the United States shall be admitted in evidence equally with the originals thereof.

Rule 32, F.R. Crim. Proc., provides in pertinent part:

> (a) Sentence shall be imposed without unreasonable delay. Pending sentence the court may commit the defendant or continue or alter the

bail. Before imposing sentence the court shall afford the defendant an opportunity to make a statement in his own behalf and to present any information in mitigation of punishment.

STATEMENT

An indictment returned in the District Court for the Northern District of Illinois charged that the petitioner, on October 3, 1957, willfully refused to submit to induction into the armed forces of the United States, in violation of 50 U.S.C. (App.) 462. Following a trial to the court (a jury trial having been waived), petitioner was found guilty and sentenced to three years' imprisonment (App. 31, 33). On appeal, the court of appeals affirmed (Vol. III, 1-9, 10).

The pertinent facts may be summarized as follows:

1. Petitioner is a member of the Harshmanite Church which is opposed to all forms of military training and service. During 1955, petitioner had a Selective Service Classification of I-A-O from Local Selective Service Board No. 177 of Sullivan, Illinois. This classification qualified the petitioner for non-combatant military service in the armed forces of the United States. In 1955, petitioner sought to have this classification changed to a I-O classification which would exempt him, as a conscientious objector, from all forms of military training and service. On May 10, 1955, the Deputy Selective Service Director for Illinois informed Local Board No. 177 that petitioner's file would be returned to them for "complete re-processing" and that the office of the Illinois Selec-

tive Service Director was "closing [its] file in the matter" (Vol. II, 6).

Thereafter, Local Board No. 177, which was then composed of different members from those who had previously classified petitioner, reclassified him in class I-A-O. On November 14, 1955, petitioner appeared before the local board and challenged his I-A-O classification as violating his religious beliefs. He said that the board "should know that the previous board was prejudice[d]" against him, and that he was entitled, as a conscientious objector, to a I-O classification (Vol. I, 21). The board stated that it was a "new board", that petitioner was given a "new classification", and that they took petitioner's religious background into consideration in classifying him I-A-O. The board also pointed out that, since I-O classifications were not counted in the fulfillment of the board's draft quota, it would be unfair to require another registrant to take the place of the petitioner; and that all the conscientious objectors of Moultrie County were given I-A-O classifications (Vol. I, 22). Petitioner then appealed to the State Selective Service Appeal Board.

2. Pursuant to Section 6(j) of the Universal Military Training and Service Act, 50 U.S.C. (App.) 456(j), the Department of Justice investigated petitioner's case for the purpose of making a recommendation to the State Appeal Board. After a hearing, the Department recommended that petitioner be given a I-A-O classification because he was working in an industry which was engaged in the manufacture of defense products under government contract

(Vol. I, 24-27). The Department pointed out that, although the petitioner had established his conscientious objection to combat military training and service, he had "failed to sustain his claim with respect to noncombatant service."

3. On May 10, 1957, the Illinois Appeal Board determined that petitioner's "proper classification" was I-A-O. In reaching this conclusion, the board specifically disagreed with and ignored the conclusions arrived at by the local board. The appeal board said (Vol. I, 30):

> We find we are in disagreement with certain conclusions of the local board as set forth in the memoranda of the actions taken by the local board in classifying this registrant. For this reason we are entirely ignoring all of the local board's conclusions as stated in their memoranda.
>
> We note that the registrant's file appears to be full and complete and that the registrant and all other interested parties have been given unlimited opportunity to place in his cover sheet all of the facts he desired to file or to have filed on his behalf in support of his claim as a conscientious objector.
>
> We have considered Mr. Van Hook's complete cover sheet as above explained, and we have considered the recommendation of the Department of Justice without being bound by it, and we have independently reached the conclusion that Registrant Van Hook is eligible for Class I-A-O, as a conscientious objector to combatant training and service as defined by the Act of Congress, but that he is not eligible for Class I-O as a conscientious objector to both combatant and noncombatant service as defined by the Congress.

4. Local Board No. 177 subsequently ordered the petitioner to be inducted for noncombatant service into the armed forces. On October 3, 1957, in Chicago, Illinois, petitioner willfully refused to submit to induction into the armed forces on the ground that his church would not permit him to be inducted (Vol. I, 31; App. 16-17).

ARGUMENT

1. There is no merit to petitioner's contention (Pet. 3, 15-16, 19) that there was no adequate proof that he refused to be inducted. In a letter to the United States Attorney, Captain W. H. Schuttler, the Deputy Commanding Officer at the induction center in Chicago, formally reported that the petitioner, on October 3, 1957, refused to submit to induction into the armed forces (Vol. I, 31). This letter, which was introduced into evidence at the trial, stated that the petitioner had said that his religion would not permit him to be inducted, that he refused to sign a written statement confirming his refusal to submit to induction, that he was advised that his refusal constituted a felony which would subject him to fine and imprisonment, and that three members of the military witnessed his "refusal to submit to induction" (Vol. I, 31). This letter was submitted to the United States Attorney in accordance with paragraph 28 of Department of the Army Regulation 601-270, effective April 5, 1956.[2] Contrary to petitioner's conten-

[2] In his letter, Captain Schuttler referred to paragraph 27(b) of Special Regulation 615-180-1 which, at the time he wrote the letter, had been superseded by paragraph 28 of

tion (Pet. 15-16, 19), the letter was properly introduced, under 28 U.S.C. 1733, *supra*, p. 2, as a government record of an "occurrence." Moreover, in February 1958, petitioner told an F.B.I. agent that he reported for induction but that "he did not submit to induction on the morning of October 3, 1957" (App. 17). As the court below held (Pet. App. 5-8), this evidence was sufficient to show petitioner's refusal to submit to induction.

2. Petitioner also contends (Pet. 23-26) that the decision that he should be put in class I-A-O lacked any factual basis. He argues, first, that there was no proper basis for his classification by the local board, and that this error of the local board "[a]ffected the decision of the Appeal Board." There is, however, no occasion to review the proceedings before the local board since petitioner's classification—the one upon which he was ordered to report and to submit to induction—was reached after full consideration and classification *de novo* by the Appeal Board. Whether the local board applied proper standards is, therefore, immaterial, as the court below pointed out (Pet. App., 3; Vol. III, 3). To the same effect, see *Goetz* v. *United States*, 216 F. 2d 270, 272 (C.A. 9); *United States* v. *Hartman*, 209 F. 2d 366, 368 (C.A. 2); *Evans* v. *United States*, 252 F. 2d 509, 511 (C.A. 9); *United States* v. *Moore*, 217 F. 2d 428, 433-434 (C.A. 7), reversed on other grounds, 348 U.S. 966; *Tyrrell* v. *United States*, 200 F. 2d 8, 11 (C.A. 9), certiorari

---

Department of the Army Regulation 601-270. However, the latter regulation is an almost verbatim restatement of the former one.

denied, 345 U.S. 910; *Reed* v. *United States*, 205 F. 2d 216, 218 (C.A. 9), certiorari denied, 346 U.S. 908; *United States* v. *Chodorski*, 240 F. 2d 590, 591 (C.A. 7), certiorari denied, 353 U.S. 950. The appeal procedure would have little utility if errors before a local board, which the appeal board recognized and avoided, were deemed to infect the appellate classification. Here, the Appeal Board specifically stated that it was acting independently and *de novo*.

The decision of the Appeal Board, which is all that is now at issue, was appropriately supported by the requisite factual basis. Government Exhibits B-10 and B-55, which were in the petitioner's selective service file, indicated that he had worked for a number of years for the "Community Industries", a "factory" run by the Harshmanite Church, which manufactured under government contract various items used by the armed forces (*i.e.*, candy for army rations, tents, WAC uniforms, and naval compressors). The fact that the petitioner engaged in the manufacture of items which were used directly in the war effort—the basis of the recommendation by the Department of Justice (Vol. I, 26)—constituted a sufficient foundation for his classification of I-A-O (noncombatant service). *Blalock* v. *United States*, 247 F. 2d 615, 619 (C.A. 4); *White* v. *United States*, 215 F. 2d 782, 786 (C.A. 9), certiorari denied, 348 U.S. 970; *United States* v. *Moore*, 217 F. 2d 428, 434-435 (C.A. 7), reversed on other grounds, 348 U.S. 966; *Meredith* v. *United States*, 247 F. 2d 622, 623 (C.A. 4); *Jones* v. *United States*, 241 F. 2d 704, 705-706

(C.A. 4). See also *Clark* v. *United States*, 217 F. 2d 511, 515 (C.A. 9).

The standard for court review of a selective service classification is, of course, a limited one. As this Court pointed out in *Witmer* v. *United States*, 348 U.S. 375, 380-381: "It is well to remember that it is not for the courts to sit as super draft boards, substituting their judgments on the weight of the evidence for those of the designated agencies. Nor should they look for substantial evidence to support such determinations. *Dickinson* v. *United States*, 346 U.S. 389, 396 (1953). The classification can be overturned only if it has 'no basis in fact.' *Estep* v. *United States*, 327 U.S. 114, 122 (1946)." Under this standard, there was plainly sufficient grounding for the Appeal Board's determination.

Petitioner's corollary claim (Pet. 26-27) that the trial court did not adequately search the record to ascertain whether there was a basis in fact for his classification is refuted by the record. At the conclusion of the government's case, counsel for the petitioner moved for a judgment of acquittal on the ground that there was no factual basis for the local board "to refuse to grant defendant the classification of 1-O as requested by him" (App. 19). During argument on the motion, government counsel specifically called the court's attention to the fact that petitioner had worked for a number of years at the "Community Industries" which engaged in defense production work under government contract (App. 23). Government Exhibits B-10, B-55 and B-57, which were before the court, spelled out the work of

the "Community Industries" and petitioner's relationship to that organization (Vol. I, 1-19, 24-27, 28-29).

Petitioner makes the strained argument (Pet. 27-28) that the opinion of the court of appeals "calls for reliance on 'suspicion and speculation'" in ascertaining whether there was a factual basis for his classification. This is not so. The court of appeals merely pointed out that the exhibits were separately introduced "with brief descriptions of each"; that, during the course of argument, counsel on both sides made specific references to "documents and their contents", among which was one from the Pastor of the Harshmanite Church (Government Exhibit B-10) indicating that that Church operated a factory which engaged in defense production work; that the court called for the "appeal board's letter"; and that counsel for the petitioner "described the contents of various portions of the file in some detail" (Pet. App. 9; Vol. III, 9). The appellate court then concluded that "[t]hese descriptions alone could have provided adequate information for the Trial Court's limited scope of review: ascertaining whether there was a basis in fact for the classification given" (Pet. App. 9; Vol. III, 9).

3. Petitioner contends (Pet. 20-21) that the instructions from the Appeal Board, on May 10, 1955, to the local board to reprocess the petitioner's case were disregarded by the local board, and that, therefore, his classification by the local board was void. But, as already indicated, *supra*, pp. 7-8, the proceedings before the local board are immaterial in the present posture of the case since petitioner's classifi-

cation was given him following *de novo* consideration and classification by the Appeal Board.[3] Moreover (in addition to the fact that the petitioner failed to raise this issue below), the contention is without foundation. When petitioner appeared before the local board on November 28, 1955, the board informed him that it was a "new board", that it considered petitioner's religion in classifying him I-A-O, and that he was given "*entirely a new classification*" (Vol. I, 21) [emphasis added].

The general contention (Pet. 30-32) that the proceedings before the Appeal Board were a "sham" is likewise without support in the record. Petitioner was accorded full opportunity to present evidence for his selective service file. He admitted that he received a resume of the F.B.I. report and a copy of the recommendation of the Department of Justice, and that he was "allowed to file all documents on his behalf" and "to present his case adequately" before the local board (App. 16).[4] The Appeal Board noted that petitioner's file appeared to be "full and complete", and that the petitioner and all other interested parties were given an "unlimited opportunity" to have evidence on his behalf inserted in his file (Vol. I, 30).

---

[3] This point also disposes of petitioner's contention (Pet. 21-23, 31) that he was denied a fair hearing by the local board.

[4] This Court, in *Simmons* v. *United States*, 348 U.S. 397, and *Gonzales* v. *United States*, 348 U.S. 407, held that defendants there involved were entitled, respectively, to a fair resume of the F.B.I. reports and a copy of the recommendations of the Department of Justice to the Appeal Board.

It was only after full consideration of his file, together with the Departmental recommendations, that the Appeal Board placed petitioner in class I-A-O (Vol. I, 30).

4. The trial court, which heard the case without a jury, announced a finding of guilty and imposed a sentence of three years. When defense counsel called attention to the fact that he had not made a closing argument, the court permitted him to do so, and thereafter again announced its finding of guilt and sentence (App. 31-32).

5. Since the court did not ask either petitioner or counsel whether he had anything to say with respect to sentence, there was no compliance at all with Rule 32(a), F.R. Crim. P., *supra*, pp. 2-3. In view of this Court's ruling in *Green* v. *United States*, No. 70, decided February 27, 1961, petitioner should be resentenced.

CONCLUSION

Because of the lack of compliance with Rule 32(a), F.R. Crim. P., the government suggests that the petition for a writ of certiorari should be granted and the cause remanded to the district court for re-sentencing. In all other respects, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

HERBERT J. MILLER, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
RICHARD W. SCHMUDE,
Attorneys.

MARCH 1961.